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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 197 and 201

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC & GAS COMPANY, UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY, *Petitioners*,

v.

BEL OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, LOUISIANA LAND AND EXPLORATION COMPANY, MORRIS RAUCH, ET AL., AND SUN OIL COMPANY, *Respondents*.

On Cross-Petition and Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY IN OPPOSITION

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OPINION BELOW

The orders of the Federal Power Commission dismissing the proceeding (R. 555-580) and denying petition for rehearing (R. 586-600) are reported at 16 F. P. C. 100 and 16 PUR (3d) 112. The opinion of

the Court of Appeals (Pet. App. 1a-14a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1958 (Pet. App. 86 a). The petition for a writ of certiorari was filed on July 22, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether independent producers as are respondents, with far-flung domestic operations are required by the holding in the *City of Detroit* decision to invariably submit net investment, rate-base data to the Federal Power Commission in support of the justness and reasonableness of an arm's-length negotiated sale price for a segment of their total natural gas production under pain of disallowance thereof.

2. Whether a fixed, definite and certain contract price for new gas sales freely negotiated at arm's-length prior to June 7, 1954, to be in force on a date thereafter, is a new rate or a change in rate under the terms of § 4 of the Natural Gas Act.[2]

3. Whether the Federal Power Commission could be required under the provisions of the Natural Gas Act to reopen proceedings in view of the denial by it of opportunity for respondents' effort to present cost of service evidence when the Commission had declared such evidence necessary only in its final order of

[1] *City of Detroit* v. *Federal Power Commission*, 203 F. 2d 810 (CADC), certiorari denied, 253 U. S. 829.

[2] 52 Stat. 822 (1938); 15 U. S. C. § 717(c).

dismissal, and which evidence it now confesses is inapplicable and impossible to produce in such circumstances as were then before it.

STATUTE INVOLVED

The applicable portions of the Natural Gas Act are set forth in the Appendices to the Petition at pages 81 a-84 a.

STATEMENT

Respondents are engaged in the business of producing oil and gas in a number of areas throughout the United States.

In 1948, a gas sales contract was negotiated by respondents with Transcontinental Gas Pipeline Corporation, (Transcontinental) (R. 248-249) a natural gas pipeline transmission company for natural gas produced by respondents from five southern Louisiana producing areas. This contract contained the usual and customary provisions in common usage in the industry with respect to first party and third party favored nations clauses and a *bona fide* purchase offer clause (R. 52-55). Its term was twenty years. Deliveries of gas commenced thereunder in 1951.

In 1952, Transcontinental became aware that its future gas supply was in jeopardy and that the contract price for its then present supply was subject to drastic increase (R. 35-36). Other pipeline purchasers were entering the area with offers for natural gas purchases in excess of the contract price contained in the then existing contract with respondents (R. 36-37). The higher prices being offered, and future price escalations under the third party favored nations contractual clauses would place the future cost of gas to Transcontinental beyond its power to control (R. 38-39).

Likewise, a dispute arose between the parties as to the effect of an unrelated sale and purchase by others upon the escalated price to be paid respondents by Transcontinental (R. 40 *et seq.*). Arbitration of this dispute resulted in a settlement between the parties under which an interim price of 8.79¢ per Mcf plus 1¢ per Mcf tax reimbursement was to be effective from July 1, 1952 until November 1, 1954. In addition, the third party favored nations clause in the 1948 contract was to be held in abeyance (R. 41).

Thereafter, arm's-length negotiations were conducted by Transcontinental and respondents which resulted in the execution of five superseding contracts on November 17, 1953 (R. 43). In return for a price of 16¢ per Mcf plus 1¢ for tax reimbursement, respondents, in terms of Transcontinental, gave "very valuable and basic consideration" under these 1953 renegotiated agreements (R. 46-49).

According to the purchaser, the considerations granted by respondents in return for the 16¢ price in the negotiation of the new 1953 agreements have benefited its position immeasurably. Thus, the new contracts would grant, among many other benefits, the following rights (R. 42, *et seq.*):

1. A new extended contract term of 20 years.

2. The deletion of the previously effective third party favored nations clauses.

3. Restriction of the area of influence of the first party favored nations clause to exclude all areas east of the Mississippi River.

4. Dedication under the new contracts of additional gas reserves in the order of 383 billion cubic feet.

5. Increase in maximum daily allowable deliveries to 125,000,000 cubic feet.

6. Fixed and certain prices throughout the 20 year contractual term far below the price of other comparable gas supplies then and now available.

7. At the buyer's option, to purchase under the same fixed price all additional gas supplies developed in the producing areas subject to the contracts.

8. Dedication of approximately 100 billion cubic feet to respondents' performance under the new contracts.

In short, Transcontinental felt that it "had made a good deal" (R. 36-49).

The 1953 contracts were negotiated upon the basic reliance by respondents of historically consistent repudiation by the Federal Power Commission of its jurisdiction under the Natural Gas Act over producers and gatherers of natural gas. *Columbia Fuel Corporation*, 2 FPC 200; *Regulation No.* 163, 17 F. R. 7385; *Regulation* No. 144, 13 F. R. 6371.

On June 7, 1954, this Honorable Court rendered its decision in the *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

On August 6, 1954, the Federal Power Commission without notice or hearing issued its Order No. 174-A with dissent. The order required the filing of initial rate schedules and applications for certificates of public convenience (R. 327-346).

Under protest and with full reservation of rights, respondents submitted in compliance thereto on September 30, 1954. The filings were made by them to avoid the criminal penalties imposed for violations

thereof. Included in these filings were all contracts governing the sales to Transcontinental (R. 389-394); that is, the original May 4, 1948 contract (R. 248-284); the September 6, 1952 amendment thereto resulting from the arbitration of the interim 8.797150¢ price per Mcf to October 31, 1954 (R. 284-194); and the November 17, 1953 agreement to be effective November 1, 1954 as cited before (R. 295-327).

History of Proceedings: On October 29, 1954, the Federal Power Commission issued orders suspending the use of the November 13, 1953 contract terms, as theretofore negotiated to become effective on November 1, 1954 (R. 389-394). The Federal Power Commission on December 7, 1954 denied (R. 411-415) respondents' request for reconsideration and vacation of the suspension orders (R. 394-410). This action was sustained, *Union Oil Company of California and Louisiana Land and Exploration Company* v. *F.P.C.*, 236 F. 2d 816, *cert.* denied 352 U. S. 969, on the general grounds that the orders were then not reviewable.

Hearings on the matters before the Federal Power Commission were first conducted in September 21-23, 1955 in which respondents by uncontroverted evidence established a mass of substantive detail on the justness and reasonableness including the facts heretofore recited. Petitioners thereafter made motion to dismiss on the general ground that respondents had not sustained the burden of proof under Section 4(e) of the Act, to show that the prices in the 1953 superseding contracts were just and reasonable. On October 24, 1955, the Federal Power Commission issued its order which deferred action on the motion and referred the proceedings to its Examiner (R. 468-477).

Pursuant to Federal Power Commission directive, hearings were resumed before it on November 28,

1955 and respondents exhaustively established the pertinent evidence applicable to, and in justification of, its 1953 negotiated contract price. This evidence, again uncontroverted, established among many others, the following facts:

> The minimum price of 16¢ per Mcf was required for pipeline purchasers to then secure gas suppliers because the competitively established level in the producing areas in question ranged from 16¢ to 20¢ (R. 122-126). Such gas reserves several years later, in 1955 were readily sold at 20¢ per Mcf (R, 119).
>
> Further, the contract prices of 16¢ were considered fair and reasonable by the parties. It was a price that resulted in considerably lower end-use customer costs in the terminal markets than were rates of Transcontinental's pipeline competitor (R. 109-111). Petitioners occupied no dominant position in the natural gas producing industry either in Louisiana; in the nation as a whole; or in relation to Transcontinental's total gas purchases (R. 92-97, Exhibits 4, 5, 6, R. 149-153). The 1953 renegotiated contract price of 16¢ per Mcf is less than the price of competing fuels, either coal or oil at the sites of production of such fuels and the places of use thereof (R. 128-129).
>
> On a national basis, additions to domestic natural gas reserves have not maintained pace with the accelerated rate of gas consumption. The rates of proved reserves to net annual production has declined from 32.5 years in 1946 to 22.4 years in 1954 (Exhibits 18 and 19, R. 158, 159, R. 104-105, R. 113-118, Exhibit 31, R. 170-195). Less gas and oil reserve is found per unit of exploratory hole drilled, the costs of which in turn are increasing constantly as deeper drilling is conducted in more inaccessible areas (R. 115-120).

> The incentive for exploration and development of new gas reserves is directly geared to the prices which the producers can expect to market the proceeds which are on statistical basis infrequently encountered (R. 106-107, 114). A reasonable level of compensation is necessarily required, as well as removal of the uncertainties of the present state of the law upon which prices will be determined in the administrative forum, in order to stabilize the industry and permit orderly and timely development of natural gas reserves (Tr. 215-216).

Petitioners renewed motion to dismiss on November 30, 1956 which was referred to on December 2, 1956. The Federal Power Commission by order issued January 23, 1956 postponed its action on the motion, and pursuant to notice of resumption, the proceedings were reconvened for hearing on March 14, 1956. Respondents having concluded the direct cases in chief, rested. No other party introduced evidence and the hearing was concluded. Motions to dismiss were renewed by petitioners.

The initial decision issued on May 2, 1956 (R. 486-543). Intervenor's motions to dismiss were therein sustained solely upon the absence of evidence of costs of service to support the 16 cent price per Mcf contained in the 1953 superseding contracts. Respondents' motion to dismiss on jurisdictional grounds was denied.

After exceptions filed and argument had, the order of the Federal Power Commission accompanying its divided opinion No. 300[3] (R. 554-580) issued December 6, 1956. *This order also imposed upon petitioners each and every obligation and condition of the new and superseding contracts of November 17, 1953, but*

[3] *Union Oil Company of California* (Opinion 300), 16 F. P. C. 100.

denied to them the only consideration therefor flowing to them, namely, the increased price for which they had contracted to furnish the new services and impressive benefits to Transcontinental.

Opinion No. 300 announced for the first time that the *City of Detroit* criteria *supra* p. 2 fn. 1 obtained in producer proceedings. (Pet. App. 10a, 11a)

After petitions for rehearing filed on January 4, 1957 (R. 585-586) and denied by Federal Power Commission on January 31, 1957 (R. 586-600) and February 8, 1957 (R. 601-602), petition for review was filed by respondents in the court below on March 27, 1957, under Section 19 (b) of the Natural Gas Act and Section 10 of the Administrative Procedure Act for relief cited before; specifically that among other things, Federal Power Commission be directed to reopen the proceedings with leave to respondents to adduce additional evidence deemed necessary only then by Federal Power Commission to support the justness and reasonableness of respondents' 1953 contract prices of 16c per Mcf plus 1c state tax reimbursement.

ARGUMENT

"Statement of the Case" in the petition attempts in an unfortunate manner to cast the erroneous impression that respondents through deliberate design and determined intent seek the frustration of the regulatory function of the Federal Power Commission (Commission) to which jurisdiction these petitioners, as complainants, are in no manner subject, nor through which regulatory function these same petitioners incur no liability.

In furtherance of this objective, petitioners infer that respondents with all obstinance have persistently

declined in a proceeding before the Commission, convened presumably for the express purpose therefor, to submit evidence of financial requirements in support of those freely negotiated contract 16 cent prices agreed upon with Transcontinental, all deliberately done, supposedly, with the knowledge aforehand that such type of evidence was and is even now essentially requisite to compliance with the law of the matter, however unsettled.

Petitioners grievously err to the prejudice of respondents in this presentation in both matters of law and matters of fact.

1. The 16 cent price per Mcf plus one cent state tax reimbursement was not the result, as petitioners state, (Pet. 3)[4] of the automatic escalation clauses in respondents' contracts with Transcontinental Gas Pipe Line Company (Transco). The presiding examiner of the Federal Power Commission in the intermediate decision leading to Opinion No. 300, so established (R. 500):

> It should immediately be noted that this theory is, of course, not in any way applicable to the instant *Union Oil* increase in Docket Nos. G-4331 and G-4332, *since the proposed now 16¢ rate there came into being in an entirely new contract, having an effective date of November 1, 1954*, and not as a result of the operation of any provision in the original contract of May 4, 1948 (Italics provided).

This point of the Examiner's decision was specifically affirmed by the Commission (R. 562) yet notwithstanding it was suspended as a change in rate (R. 398-391).

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[4] "Pet. " refers to petitioners' cross-petition and petition.

2. Petitioners err in the conclusion that respondents failed after "three rounds of hearings to justify the higher rate" (Pet. 4). This conclusion is diametrically opposed to the evidence of record in that the Commission and its examiner recognized that respondents initially presented extensive "documentary evidence and oral testimony" (R. 471) and thereafter "voluminous additional evidence consisting of some 33 new exhibits, together with additional testimony of six witnesses" (R. 479). Further, the record demonstrates that the proceeding was divided into two phases (R. 502, 517, 550) not "three rounds"[5] with respondents making every conceivable effort throughout to pursue to satisfaction the elusive character of evidence which could or would be persuasive in the circumstances of this, the first series of cases involving the rates of independent producers before the Commission (R. 475). It is noteworthy, too, that at the time of hearing this effort was expended in the ambiguous background recognized by all that the Commission had not then or even to this day developed standards which should be applied in fixing producer rates. (R. 76, Pet. 8).[6]

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[5] The "third round" to which petitioners refer was a resumption of the proceeding to permit petitioners to cross-examine and present evidence in rebuttal, such petitioners having been unable or incapable of so doing at times previous thereto (R. 495-96).

[6] In FPC Opinion No. 310, *Pan American Petroleum Corp., et al.*, issued as recently as April 4, 1958, 19 FPC 463, and cited by the Court below (Pet. App. 10a) the Commission stated:

> . . . In fact . . . we have not determined in any case the extent to which such evidence (rate base evidence or evidence of revenue requirements) should be required of the independent producers (Parenthesis added)

3. Petitioners err in raising the implication that respondents wilfully declined to submit cost and financial data as ordained by the Commission, it being recklessly asserted (Pet. 4) that:

> . . . The producers understood what was being asked of them, as the Court below found . . . The producers, nevertheless, in each of the proceedings, withheld such data with full knowledge that the need for it was an issue . . . .

The record clearly discloses that petitioners were either unwilling or disinclined to submit in rebuttal the type of evidence which they themselves extensively advocated (R. 18, 84, 496). Petitioners' premise repeatedly has been rejected by the Commission and its Examiner when vainly tried before to dictate the exclusive character of evidence upon which it, the Commission must have before it to fix producer rates (R. 74-76, 463, 475, 547). Petitioners thus have eloinged the issue with some effect, to the end that black would now appear indeed to be white. This presumption advanced in error was likewise summarily rejected in similar manner to that above by the Court below (Pet. App. 11a). It is clear, in the situation, that petitioners cannot seek with justification before this Court or elsewhere to cloak their interpretations of the requisite evidence to be offered at the expense and effort of respondents with the same dignity and authority as that which would accompany Commission and Court pronouncement and mandate.

4. Petitioners err in the argument that the basis of administrative delay in adjudication by the Commission must be laid at the door of producers (Pet. 8).

The producers as a class which are thus subjected to this indictment obviously comprise the one group

of the industry most prejudiced by this delay (R. 78-82). Petitioners here, as interveners below, have participated at length in these and many other similar proceedings to the great protraction thereof. While these petitioners before this Court denounce the affirmative evidence advanced in earnest effort by respondents all done with sincere conviction of its worth, substance and merit in these particular premises, these same petitioners have volunteered no showing in support of their cause which would be beneficial to the early disposition of the issues herein raised, despite the call to do so by respondents, and full opportunity having been afforded therefor (R. 79, 83, 84, 495, 496).

Further, petitioners contrary to implication in argument (Pet. 8), assume no financial risk, nor do they stand chance of monetary loss by protraction of this interim of extensive delay. Instead, such petitioners are eligible of and to themselves exclusively of economic windfalls in the form of interest on such funds as may be ordered eventually refundable by respondents to petitioners and which in turn would not be susceptible to refund by petitioners to the "millions of consumers" whose interests they espouse here (Pet. 8, 9).

It is clear that petitioners can speak for their interests alone and do so here in the face of the absence of the two legislatively established agencies that as parties to this proceeding are the ones exclusively charged with the protection of the public interest. These are the Federal Power Commission and the Public Service Commission of the State of New York (R. 488). Neither one of the foregoing bodies have seen fit to seek review of the decision of the court below to which the petition here is directed.

5. Petitioners err in the assertion that court decision has established the proposition that financial data is indispensible to a rate case (Pet. 8).

Refutation of this baseless conclusion is inherent even in the two cases cited by petitioners asserted in support thereof. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 581. These and many other cases of such long standing have so firmly established to the contrary that no extensive discussion in opposition is required.

The law of the matter has been determined by this Court to be that it is within the prerogative of the Commission in the ambit of its legislatively delegated authority to select a rate formula free from judicial interference so long as rates are not demonstrated by the evidence to be either confiscatory at one extreme of the scale or unreasonably high on the other. *Cf. Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635; *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575. The Commission has consistently adhered to this established precept in this and other proceedings before it (R. 539, 547).[7]

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[7] In FPC Opinion No. 310, *Pan American*, *supra*, f.n. 6 the Commission stated:

"'. . . In the *City of Detroit* case (R. 571) as is patent from reading the opinion the Court was primarily concerned with the protection of the consumer of gas. It is clear here that to disallow this increased rate because of rigid adherance to a cost policy would '. . . (be) . . . to the detriment of the consumers elsewhere.' To approve this rate which we think fully supported, is a type of '*pragmatic* adjustment' which we are permitted to make. *F. P. C.* v. *Natural Gas Pipeline Co.*, *supra*, p. 586. *Cf. Market Street Railway Co.* v. *Comm'n.*, 324 U. S. 548, 563-569." (Parenthesis added.)

6. Petitioners err in the declaratory accusation that respondents "have sought delay at every opportunity hoping for legislative relief from the rate making consequences to them of *Phillips*" (Pet. 8, 9).

In extension of disclosure of the same patent error assigned petitioners under No. 4, *supra,* the record reflects four requests of respondents for postponement of these proceedings, each made and granted for good, necessary and sufficient causes there shown (R. 444, 450, 457, 465, Pet. App. 19(a), fn. 5). At the outset, it is to be observed that each of these four requests were granted absent any protest of record by petitioners, for the basic reason that delay of this matter then and now can be of else than benefit to these same petitioners, *supra,* p. 13.

The first such request of February 14, 1955, in the form of a motion for continuance and reassignment of hearing date as then set for March 8, 1955, was essential due to pendency of petition to review taken to Commission orders Nos. 174-A and 174-B and the suspension orders of October 29 and December 24, 1954. Adjudication of the validity of these orders was fundamental to the determination in the first instance of jurisdiction of the Commission in the premises (R. 444).

The second such request of March 2, 1955 to postpone the proceeding before the Commission as then reset for March 21, 1955 was required and grounded on the same basis as the first above (R. 450).

The third such request of May 24, 1955 to postpone the proceedings as then reset for June 20, 1955, was similarly based upon the then still pending appellate review. Additionally it was appropriate in view of the introduction of legislation before the Congress of

the United States, to which the Commission had reported favorably. This legislation if enacted would have rendered moot these proceedings before the Commission (R. 457, 458).

The fourth such request of June 24, 1955, in addition to being required by all of the foregoing, was also required due to the inability of respondents to proceed with the preparation of evidence, of then uncertain and nebulous character, and which evidence was to have been the subject of future ascertainment in conference between all parties, including petitioners, to the proceedings (R. 464). This effort toward conference of parties was exerted in the sincere desire that there be established some standards, principle or method by which the Commission's administrative burden could be lessened to the benefit of all parties to this proceeding, through the expeditious determination of the just and reasonable character of the contract prices here in question.

7. Petitioners err in their position that the Court below was not empowered in these particular circumstances to direct the Commission to reopen the proceedings for the purposes stated (Pet. 9-11).

As a general matter of law it is unquestioned that the discretion to reopen administrative proceedings lies with the administrative agency absent extraordinary circumstances or abuse of exercised discretion.

However, the authorities cited (Pet. 9-11) in the petition apply to completely dissimilar situations than the particular matters here and fail utterly to lend support to the argument petitioners advance.[8] To be

[8] For example, *Interstate Commerce Commission, et al. v. City of Jersey City, et al.*, 322 U. S. 503, wherein that Commission ad-

more proximate in argument it is incumbent upon petitioners to first dislodge the following several firmly established propositions which are so pertinent and controlling in the circumstances of this case.

One, that conclusions of law by the Commission while entitled to consideration by the courts do not have the same finality as findings of fact, *Levinson* v. *Spector Motor Co.*, 330 U. S. 649. *Two*, as stated in *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94 ". . . if the action (by the Commission) is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law . . ." *Three*, ". . . the administrative process will best be vindicated by clarity in its exercise . . ." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197. *Four*, ". . . where as here, an applicant relying on good faith upon previously determined standards, as expressed in previous written statements or conclusions of agencies, acts in accordance with such standards, such applicant should not be precluded from an opportunity to meet the revised standards if, without notice, the agency determines upon new or more sensitive standards. That is all the more true where, as here, the applicant has stated in writing and unequivocally that it is in a position to meet such revised

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ministering an entirely different statute than the Natural Gas Act was sustained in its order reopening a limited portion rather than the entire proceeding; *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563 also involving the administration of an entirely dissimilar statute than is the Natural Gas Act, ruled that the order of the Board of the court to adduce additional evidence was ineffective when the matter to which the additional evidence would pertain would not be in any instance within the purview of the court's jurisdiction to thereafter pass upon.

standards by competent evidence, if allowed the opportunity to do so. . . ." *E. Brooke Matlack, Inc.* v. *United States,* 119 F. Supp. 617, 622.

The court below in its decision [9] in effect did nothing more than to determine as a matter of law that the evidence of record was not sufficient for it to pass upon the many vital issues of law which were before it on respondents' (petitioners below) petition for review of the several Commission orders (Pet. App. 13 a). The decision is not final. It simply provides for the receipt of evidence which petitioners themselves have repeatedly demanded (Pet. 8) all in order to attain an objective that their spokesman has stated of record that he ". . . does not oppose but in fact supports. . . ." (R. 17).

The court below did not disturb the findings of fact of the Commission contained in opinion No. 300, *Union Oil Company of California, et al.,* 16 F. P. C. 100 (Pet. App. 17a-41a). However, what it did say was that the finding of law [10] of the Commission in that opinion was not then being affirmed (Pet. 10 a). The court indicated that this finding would be passed upon with

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[9] Respondents' position should not be construed to be in support of substantive matter contained in the decision below, but respondents urge with utmost conviction that the law establishes the right, duty and power of the lower court to direct the reopening of these proceedings in the particular circumstances of the case.

[10] The entire thrust of the Commission's opinion No. 300 was hinged upon one conclusion of law (Pet. App. 6 a, 7 a, 32 a, 46 a, 47 a) to wit:

". . . We think that the recent decision of the Court of Appeals for the District of Columbia Circuit in *City of Detroit* v. *Federal Power Commission,* 230 F. 2d 810 (C. A. D. C. 1956), *certiorari* denied, 352 U. S. 829 is controlling here. . . ."

other issues upon *completion* of the record before the Commission (Pet. App. 13 a). The record manifestly was determined in its present state to be incomplete for adjudication of this question. This was within the proper scope of judicial review. The court did not seek to enlarge the statutory scope of proper judicial review. Quite to the contrary, it recognized that the Commission is the trier of fact, but to enable the court to pass upon questions of law raised on those facts, obviously necessary evidence, must first be adduced after opportunity afforded.

* * * *

Further, the court below perceived that the exercise of the administrative process here is by no means clear (Pet. App. 10 a, 11 a). In such obscurity the administrative process cannot be vindicated, *supra,* p. 17. The chronological sequence of events of this administrative process in this particular instance is illustrative.

1. The Commission on December 1, 1955 terminated the proceedings in its Docket No. R-142 and declined therein to establish the rules for which purpose the proceeding had been convened. These rules would have declared the character of evidence deemed necessary by the Commission in the determination of just and reasonable rates of any independent producer subject to its jurisdiction under the Natural Gas Act (R. 462, 463).

2. The proceedings before the Commission which were convened to pass upon the just and reasonable nature of respondents' contract prices here in issue, were concluded on March 14, 1956 (R. 560).

3. The trial examiner's decision in respondents' rate proceeding issued on May 2, 1956 and espoused

the applicability of the *City of Detroit* doctrine as governing in the matters (R. 535).

4. At the very same time as this intermediate decision issued, May, 1956, the Commission was seeking before this Court to overthrow the *City of Detroit* doctrine.[11]

5. The intermediate decision in these matters was adopted by the Commission in its opinion No. 300 issued December 6, 1956, *supra* p. 1, approximately eight months thereafter, at which time respondents first became aware of the Commission's standard of requisite cost evidence in support of their contract prices (Pet. App. 10 a, 11 a).

6. The Commission by order issued January 31, 1957 denied respondents' request for leave to present

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[11] The Commission, in its petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, *Federal Power Commission, Petitioner* v. *City of Detroit, Michigan, and County of Wayne, Michigan*, No. 113, dated May, 1956, stated in part (pp. 11, 12):

> ". . . If the lower court means to require adherance by the Commission to the rate-base formula 'as a basis of comparison' or 'as a point of departure' the court necessarily is running *contra* to the prior decisions of this Court. Flexibility in the selection of formula and freedom to select the formula best calculated to serve the public interest are the essence of the rate making function and indeed this Court has been zealous to protect regulatory agencies in this basic prerogative. . . . In other words, the court did not consider the field price method on its own intrinsic worth but related it to another formula. We respectfully suggest that if the field price formula is proper—and its suitability was accepted by the lower court—it is proper on its own merits and does not become suspect because it produces larger amounts than would be produced by some other method. . . ."

evidence of their financial requirements and on appropriate rate base and cost of service applicable to their sales to Transcontinental (R. 586, 587).

* * * *

Finally, it is clear that the resolution of the vital legal issues fundamental in the petition to review in the lower court is soundly within the jurisdictional scope of that court to review under the statute. The Natural Gas Act, § 19(b) (Pet. App. 83 a, 84 a) reads clearly and unequivocally in this respect. Here is no play of discretion within the exclusive control of the Commission:

> ". . . If any party shall apply to the court for leave to adduce additional evidence, and shall show to the *satisfaction of the court* that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, *the court may order* such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms as to the court may seem proper . . ." (Italics supplied)

The court below is satisfied in this respect.

CONCLUSION

For these reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I, George D. Horning, Jr., a member of the Bar of this Court and one of the attorneys for respondent herein, Union Oil Company of California, do hereby certify that pursuant to Rule 33 of this Court on the 20th day of August, 1958 I served a copy of the foregoing and annexed Brief in Opposition to the Petition for Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit upon counsel of record for petitioners, namely: David K. Kadane, Bertram D. Moll, at 250 Old County Road, Mineola, New York, attorneys for petitioner Long Island Lighting Company; J. David Mann, Jr., John E. Holtzinger, Jr., Morgan, Lewis & Bockius, 1230 Pennsylvania Building, Washington 4, D. C., attorneys for petitioner, United Gas Improvement Company; J. Harry Mulhern, 80 Park Place, Newark, New Jersey, William R. Duff, 1323 Wyatt Building, Washington 5, D. C., attorneys for petitioner, Public Service Electric & Gas Company; Vincent P. McDevitt and Samuel G. Miller, 1000 Chestnut Street, Philadelphia 5, Pennsylvania, attorneys for petitioner, Philadelphia Electric Company, by depositing the same in the United States mail properly addressed to each of the above-named persons at the respective post office addresses shown, with first class postage prepaid to those addresses shown to be within the District of Columbia, and air mail postage prepaid to those addresses shown to be elsewhere.

/s/ GEORGE D. HORNING, JR.